

1 MATTHEW J. GAUGER, Bar No. 139785
2 GARY P. PROVENCHER, Bar No. 250923
3 WEINBERG, ROGER & ROSENFELD
4 A Professional Corporation
5 428 J Street, Suite 520
6 Sacramento, California 95814-2341
7 Telephone: (916) 443-6600
8 Facsimile: (916) 442-0244
9 ATTORNEYS FOR PLAINTIFF

10 MICHAEL C. SERVERIAN, SBN 133203
11 RANKIN, LANDSNESS, LAHDE, SERVERIAN & STOCK
12 96 No. Third Street, Suite 500
13 San Jose, California 95112
14 Telephone: (408) 293-0463
15 Facsimile: (408) 293-9514
16 ATTORNEYS FOR DEFENDANT

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19 SHAUN KINNEY,

20 Plaintiff,

21 v.

22 CITY OF SANTA CLARA, a California
23 Municipal Corporation,

24 Defendant.

) No. 5:10-cv-00162 LHK

) **JOINT REQUEST FOR ~~PROPOSED~~**
) **ORDER APPROVING SETTLEMENT**
) **AND DISMISSAL WITH PREJUDICE**

25 The parties in the above captioned matter have resolved their dispute. Pursuant to a
26 Settlement Agreement dated August 26, 2010 attached hereto and incorporated herein as Exhibit A
27 and an Interim Agreement memorialized in a letter dated February 22, 2010 referenced by the
28 Settlement Agreement and incorporated herein as Exhibit B, the parties agree that their competing
rights to free speech and reasonable time, place and manner restrictions are appropriately resolved.

///

1 The parties therefore submit this Joint Request for an Order Approving Settlement and
2 Dismissal with prejudice.

3 Dated: November 2, 2010

4 WEINBERG, ROGER & ROSENFELD
5 A Professional Corporation

6 By: 

7 Matthew J. Gauger
8 Gary P. Provencher
Attorneys for Plaintiff

9 Dated: November 3, 2010

10 RANKIN, LANDSNESS, LAHDE,
11 SERVERIAN & STOCK

12 By: 

13 Michael C. Serverian
14 Attorneys for Defendants

15 GOOD CAUSE HAVING BEEN SHOWN, this case is dismissed pursuant to the parties'
16 Settlement Agreement with prejudice. The Clerk shall close the file.

17 Dated: November 10, 2010.


18 

19 The Honorable Judge Lucy H. Koh
20 United States District Judge

Exhibit A

Settlement Agreement Kinney v Santa Clara C10-00162 LHK

1. The parties agree to resolve the entire dispute. Within 10 days of approval of this settlement agreement by the City Council and payment of the attorneys fees as described below, the plaintiff will file the appropriate papers dismissing the action with prejudice and will execute a release of claims. The City will rescind the November 21, 2009 citation issued to Mr. Kinney, Citation, # 9752.
2. The parties shall continue to comply with the interim agreement memorialized in the letter dated February 18, 2010 (attached here to and incorporated as though fully set forth) until the City adopts an ordinance covered the subject matter of the instant case.
3. Any such ordinance will be equally or more protective of the carpenter's speech rights as the interim agreement.
4. The City will approve this agreement within 30 days of execution. Within 30 days of ratification the City will pay the attorney fees and costs in paragraph 5 below.
5. The parties agree to a combined attorney fee and costs award of \$42,500.
6. Any disputes over the interpretation, application or adoption of this agreement will be resolved through final and binding arbitration. In the event that the parties cannot agree on Richard D. Warren as an arbitrator, they will each pick another and those arbitrators will pick a third who will become the sole arbitrator.

 8/26/10
For the City

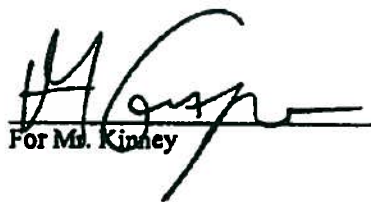
 8/26/10
For Mr. Kinney

Exhibit B

STEWART OVERBERG
DAVID A. ROSENFELD
WILLIAM A. SCHULZ
WENDY A. HARRINGTON, JR.
W. DANIEL BOONE
ELYNNE MCDONALD
GARY E. HENDEL
JAMES RUTKOWSKI
SUSANA RUIZ BORDON
CHRISTIAN L. RABEN
JAMES J. WERNER
THEODORE HUNTER
ANTONIO RUIZ
MATTHEW J. CHURCH
ASHLEY K. DEGA
LINDA BALDWIN-JONES
PATRICIA A. GAYE
ALAN G. CROWLEY
FREDRICK L. HILLMAN
DILLY P. RICH
BRUCE A. HURLAND
CONCEPCION E. LOZANO-BATISTA
CAREN P. BENDER

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION

428 J STREET, SUITE 520
SACRAMENTO, CALIFORNIA 95814-3314
TELEPHONE 916.443.6800
FAX 916.442.0244

LOUI K. AGUIRO
ANNE L. TEP
MICHELLE M. PHELPS
MANUELA CHAVILA
KIRSTEN M. ZIMMER
JOSHUA V. MANUEL
MANUEL A. RODRIGUEZ
KERRANNE A. STEELE
JOHN M. CHILDES
GARY P. PROVENCHER
LESLIE R. CLANCY
JORDAN D. HAZEN
JACOB J. WHITE
SHARON A. BENDERSTEN
LESLIE V. FREEMAN

PATRICIA M. GATEL, Of Counsel
ROBERTA D. PERROU, Of Counsel
EDWARD T. CLARY, Of Counsel
KONA FICKEL, Of Counsel

• Also admitted in Arizona
•• Admitted in Hawaii
••• Also admitted in Nevada
•••• Also admitted in Idaho

February 22, 2010

Michael C. Serverian
Rankin, Landsness, Lahde, Serverian & Stock
96 N. Third Street, Suite 500
San Jose, CA 95112

Re: Citation Homes Banner Citation
Shaun Kinney v. City of Santa Clara
Federal Civil Rights Suit Under § 1983
Administrative Citation, Case No. 09 12748

Dear Mr. Serverian:

I am writing to follow up on the many voicemail messages we have each left one another and the telephone conversation between you, Gary Provencher and me the morning of February 17th.

First, the Plaintiff has no objection to withdrawing the claim for punitive damages.

Second, as I said in my voicemails, the Plaintiff has no objection to the Defendant rejecting the magistrate and mutually requesting the case be assigned to a federal district judge. Thank you for filing the documents to that effect.

Third, we discussed placing the pending fine in abeyance and limitations on the City's enforcement of the ordinance pending the outcome of this litigation. Those issues are discussed in a separate letter.

Finally, I do not believe this case is appropriate for mutual summary judgment motions. I think it is necessary to engage in discovery prior to the parties filing terminating motions. As you will recall, the complaint alleges that the ordinance is valid on its face and as enforced. Although I doubt there will be much dispute over the facts once discovered, it will be necessary to identify with precision the manner in which the sign ordinance is actually enforced.

February 22, 2010
Page 2

The facts Plaintiff will seek to establish in discovery will focus on the usually very lax system for enforcement and the reasons for the decision to deviate from that system regarding Mr. Kinney and the Carpenters. In discovery, the Plaintiff will seek answers to the following questions.

- If the City relies on a complaint only system what, if any, steps are taken to be sure that the City's enforcement does not regulate the content of speech by applying the objections of private parties to the content of a particular sign through the City's police power?
- What citations have occurred in the past?
- In Mr. Kinney's Agnew Road case, who contacted the Police or Code Enforcement Officers?
- What, in particular, was their complaint?
- Has Citation Homes, SCS Development, Steve Schott, Jr. or Sr. or any of their agents inappropriately sought the City's assistance in silencing Carpenters' speech?
- What training have Code Enforcement Officers or Police Officers received concerning application of the sign ordinance?
- What is the legislative history of the sign ordinance?
- Is the medium a public right of way?
- Have permits been issued for the permanent or temporary signs at or near the location that Mr. Kinney received his citation?
- Finally, how does the City distinguish the apparently temporary two-gate signs and model homes open sign from Mr. Kinney's temporary banner?

In his Rule 26 disclosure, Mr. Kinney will provide photographs of the area in question. Mr. Provencher and I are happy to further discuss with you the substantial constitutional problems in the City's sign ordinance. Amazingly enough, the ordinance even prohibits handbills as a temporary sign. See Section 18.80.020(o) and (q).

My colleague Mr. Provencher and I look forward to discussing this interesting matter with you.

Sincerely



Matthew J. Gauger

MJG:tac
opeiu 3 afl-cio(1)
Enclosures

120932